UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WENDT CORPORATION,

Respondent,

and

SHOPMEN'S LOCAL UNION #567,

Petitioner.

Consolidated Case No. 03-CA-212225, 03-CA-220998, 03-CA-223594

RESPONDENT'S RESPONSE TO THE GC's EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Wendt Corporation ("Respondent" or "Wendt") submits the following brief in response to the cross-exceptions filed by the General Counsel ("GC").

RESPONSE TO PRELIMINARY STATEMENT

The GC devotes almost two pages of his six-page Brief to enumerating the alleged violations of the Act by Respondent which were allegedly "appropriately determined" by the ALJ. Respondent has addressed in detail, both in its Brief in Support of its Exceptions and its Reply Brief, the numerous errors of law and fact committed by the ALJ in finding these violations including the ALJ's failure to even once mention the Board's decision in *Raytheon Network Centric Systems,* 365 N.L.R.B. No. 161 (2017). As set forth below, the GC's second exception seeks to compound the errors of law committed by the ALJ in failing to apply *Raytheon.* Similarly, contrary to the GC's claim the ALJ properly found that the conversation between Mr. Voigt and Mr. George relating to a bargaining session between the Union and the Respondent did not violate Section 8 (a) (1) of the Act, and actually confirms the Respondent's position that Mr. Voigt was a low level manager whose views did not reflect the views of management.

POINT I

A. The GC's Second Exception Is Inconsistent With and Contrary to *Raytheon*

The GC's second exception involves the ALJ's Order directing that Respondent must post a notice to employees stating that:

> "We will not lay you off, remove unit work and assign it to supervisor, conduct performance reviews, impose disciplinary discipline, mandate overtime, or implement other terms and condition of employment when we are engaged in negotiations for a collective bargaining agreement and have not reached overall impasse."

First, to the extent that the Board grants the Respondent's Exceptions 1, 2, 3, 4 7, 9, 10, 11, 12, 14, 15, 16 and 24, the GC's exception—which seeks to exclude performance reviews and

raises from the above quoted directive—is rendered moot. As set forth in Respondent's Opening Brief, the ALJ's findings that Respondent may not continue its past practices absent overall impasse directly conflicts with the Board's decision in *Raytheon.* Specifically, as the Board stated in *Raytheon "...***regardless of the circumstances under which a past practice developed ….** an employer's past practice constitutes a term and condition of employment that permits the employer to take actions unilaterally that do not materially vary in kind or degree from what has been customary in the past." *Id.* at p. 16. (emphasis added). *Accord*, *Raytheon* at p. 13. Indeed, as the portion of the ALJ's decision finding that Respondent may not continue its past practices until overall impasse is reached the Board has stated that this "**is contrary to *Katz* and to the Board's obligation to foster stable labor relations, and it was clearly not intended by Congress**." *Raytheon, supra,* 365 N.L.R.B. at 172. (emphasis added).

Second, the GC's exception would apply a different standard to past practices depending on whether the practice benefited the union members or the employers. Nowhere in the GC's Brief does the GC offer any coherent rationale under the Act for a notice that directs that all past practices be extinguished except for reviews and raises. As the Board noted in *Raytheon,* granting the union the right to unilateral right to selectively extinguish past practices is irreconcilable with the Supreme Court's decision in *NLRB v. Katz,* 736, 82 S. Ct. 1107 (1962) (hereinafter "*Katz*").

Third, the GC's Brief simply ignores the record evidence that the Union itself asked that the Respondent defer implementation of evaluations pending bargaining. GC Ex. 6. Indeed, as the record showed, the parties were and are continuing to bargain regarding the process for employee evaluations. (GC Ex. 10 and GC Ex. 11). As set forth in Respondent's Opening Brief in support of its exceptions and its Reply Brief, in light of *Raytheon*, when—as in the case of

employee evaluations and raises—a union demands bargaining to change a past practice that involves periodic action by the employer at discrete times and that are amenable to bargaining prior to implementation, an employer may, and in fact should, honor a union's request to defer implementation until the parties reach an agreement or impasse on the practice in question. *See* Respondent's Opening Brief at 21-24; Reply Brief at 5.

In summary, the GC's second exception merely perpetuates the errors of law committed by the ALJ in failing to apply *Raytheon* in evaluating both the Respondent's right to continue those past practices for which the Union has not asked to bargain for changes, and its obligation to bargain in good faith when the Union has made not only a request to bargain but also a request to defer implementation pending the outcome of bargaining. Thus, Respondent's position is that the entire notice provision should be stricken based on its exceptions to the ALJ's findings that it violated the Act by continuing its past practices of layoff, supervisors performing the same work as unit employees, discretionary discipline and mandatory overtime in shipping and receiving. In the event the Board disagrees with some or all of these exceptions by Respondent, the GC's second exception must be denied in any event as an impermissible differentiation between past practices based on whether they benefit the employer or union. As the Board itself has found, such is irreconcilable with the Supreme Court's decision in *Katz.*

B. The ALJ Properly Found That Mr. Voigt Did Not Unlawfully Interrogate Mr. George

The GC's argument that the ALJ incorrectly found that the conversation between Mr. Voigt and Mr. George violated Section 8 (a) (1) simply ignores two undisputed facts. First, as the GC's own brief concedes, the subject of the conversations involved what was said by both management and the Union during contract negotiations at which both parties were present and which did not involve internal Union discussions. GC Brief at p. 3. Significantly, the GC does

not dispute that these discussions were not confidential and the Union itself was vocal in publicizing the status of the contract negotiations. R. 24. The GC also concedes that Mr. Voigt offered to let Mr. George know what he found out from the Company stating "and I'll be a good friend and do the same for you…" (hear anything about what happened at the negotiating meeting, including the subject of layoffs). (TR 284, JD 11:27 to 37). Not only is this statement consistent with the ALJ's finding that the discussion was not coercive or threatening, but it also confirms the record evidence that Mr. Voigt was not privy to the Company's negotiating position and did not speak for the Company with respect to issues relating to the Union. See Respondent's Opening Brief at 14-15 (identifying false and uninformed statements made by Mr. Voigt to Mr. George). Thus, the ALJ properly determined, based on the very nature of the conversation that Mr. Voigt was not engaged in an unlawful interrogation of Mr. George regarding union activities and that nothing in the conversation was coercive.

CONCLUSION

For the reasons set forth above the GC's Cross-Exceptions should be denied.

DATED: June 3, 2019
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